No. 86-336

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JOSEPH F. SPANIOL, JR.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

KARL LINNAS, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's deportation to the Soviet Union violates due process.

2. Whether the Holtzman Amendment to the Immigration and Nationality Act, 8 U.S.C. 1251(a)(19), is an unconstitutional bill of attainder.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 790 F.2d 1024. The opinions of the Board of Immigration Appeals (Pet. App. A18-A29, A33-A50) and the immigration judge (Pet. App. A30-A32, A51-A56) are unreported. An unpublished order of the court of appeals (Pet. App. A57-A60) affirming petitioner's denaturalization is reported at 685 F.2d 427 (Table). The opinion of the district court ordering petitioner's denaturalization (Pet. App. A61-A98) is reported at 527 F. Supp. 426.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1986. A petition for rehearing was denied on June 25, 1986 (Pet. App. A99). The petition for a writ of certiorari was filed on August 29, 1986. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Nazi Germany invaded the Soviet Union in 1941 and occupied Estonia by mid-July of that year. Among the invading German forces were commando units known as the *Einsatzkommandos*, who were responsible for the extermination of Jews and other groups deemed inimical to the Reich. For the most part, the *Einsatzkommandos* did not have sufficient personnel to carry out all the arrests and executions by themselves. Consequently, they relied heavily on local residents who volunteered to carry out these activities. Petitioner was one of those volunteers. Pet. App. A65-A69.

Petitioner was 21 years of age when Nazi Germany occupied Estonia, and he held the rank of second lieutenant or its equivalent in the Estonian Army Reserve. After the Nazi invasion, petitioner voluntarily joined and became a ranking member of the *Selbstschutz*, a local group in Tartu, Estonia. The *Selbstschutz* carried out most of the arrests and executions in Tartu and helped the Nazis minimize the public's awareness of the overall extermination process. Petitioner served first as a guard at the Tartu concentration camp and later as chief of the camp, after it was relocated.[1] During his tenure, Jews and non-Jews, including men, women, and children, were imprisoned at the

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[1] Petitioner claims (Pet. 11) that neither camp can be considered "a concentration camp in the sense the phrase was later used in the history of Nazi Germany." The term "concentration camp," however, appropriately describes a facility incarcerating men, women, and children who were never convicted of a crime and who were persecuted solely because of their race, religion, or political beliefs. Indeed, the very term from which he now chooses to distance himself was one that petitioner used to describe his position during the war. Evidence below demonstrated that he signed documents as "Chief of Concentration Camps" or "Chief of Tartu Concentration Camp" (Pet. App. A75).

camp. *Selbstschutz* members, including petitioner, guarded the prisoners and assisted the Nazis in several mass executions of innocent civilians at an anti-tank ditch located outside of Tartu. Petitioner participated in the executions. On one occasion, he commanded the guards to fire on the prisoners who knelt at the edge of the ditch; on another occasion, he administered the coup de grace to those who were executed. Petitioner later fought in the German Army. Pet. App. A4-A5, A65-A78.

2. Following the war, petitioner sought to emigrate to the United States under the Displaced Persons Act of 1948 (DPA), ch. 647, 62 Stat. 1009 *et seq.*, as amended by Pub. L. No. 81-555, 64 Stat. 219 *et seq.* During the qualification process, petitioner concealed his involvement in the atrocities at the Tartu concentration camp by claiming that he had been a university student in Tartu between 1940 and 1943. Petitioner also falsely represented that he had never served in the German Army and that he had never been a member of any political group or organization. Finally, petitioner falsely swore that he had never persecuted anyone on the basis of race, religion, or national origin. Petitioner concealed those misrepresentations by falsely swearing at later stages of the immigration and naturalization process that he had never persecuted anyone because of race, religion, or national origin, that he had never committed a crime involving moral turpitude, and that he had never previously given false testimony to obtain benefits under the immigration and naturalization laws. Petitioner was admitted to the United States in 1951, and he became a citizen in 1960. Pet. App. A3-A4, A82-A85.

3. In 1979, the government brought suit under 8 U.S.C. 1451(a) in the United States District Court for the Eastern District of New York to revoke petitioner's citizen-

ship.[2] On the basis of proof that was "overwhelming and largely uncontroverted" (Pet. App. A4; see *id.* at A87), the district court found that the government had proved its allegations by clear, unequivocal, and convincing evidence.[3] The district court entered judgment in the government's favor and ordered petitioner's citizenship revoked (*id.* at A61-A98; 527 F. Supp. 426). The court of appeals affirmed (Pet. App. A57-A60; 685 F.2d 427 (Table)), and this Court denied certiorari (459 U.S. 883 (1982)).

4. In 1982, the Immigration and Naturalization Service issued an order to show cause against petitioner, claiming that he was deportable from the United States on several grounds.[4] Following a hearing, the immigration

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[2] The government alleged that petitioner had "illegally procured" his citizenship, because his persecution of civilians as the chief of a concentration camp rendered him ineligible for admission to the United States under the DPA and showed that he lacked the "good moral character" necessary for naturalization. In addition, the government alleged that petitioner had procured his citizenship "by concealment of a material fact or by willful misrepresentation" of his service as chief of the Tartu concentration camp. Pet. App. A58-A59, A63.

[3] The district court held that petitioner had illegally procured his citizenship, for two reasons. First, petitioner was never lawfully admitted to the United States under the DPA. Second, he lacked the "good moral character" necessary for naturalization, because he had persecuted civilians in Estonia and because he had made material misrepresentations during the immigration and naturalization process (Pet. App. A86-A88). The district court also held that petitioner had procured his citizenship by willful concealment and misrepresentation of a material fact: among other things, his service at the Tartu concentration camp (*id.* at A89).

[4] The grounds were: first, that petitioner was excludable at the time of his entry into this country; second, that petitioner entered and remained in this country in violation of the DPA; and third, that petitioner assisted the Nazis in persecuting individuals on the basis of their race, religion, national origin, or political opinion (Pet. App. A34-A35).

judge sustained all the charges in the order to show cause (Pet. App. A52, A55). The judge ordered petitioner deported to Estonia and, in the alternative, to the Soviet Union (*id.* at A56).[5]

The Board of Immigration Appeals affirmed the immigration judge's finding that petitioner was deportable and found that petitioner was not eligible for discretionary relief (Pet. App. A43-A47). The Board remanded the case to the immigration judge, however, to reconsider whether petitioner should be deported to the Soviet Union (*id.* at A49-A50).[6] On remand, the immigration judge concluded that the Soviet Union was the proper country of deportation (*id.* at A30-A31).[7]

Petitioner again appealed to the Board of Immigration Appeals. The Board concluded that the Soviet Union was the appropriate country of deportation under 8 U.S.C. 1253, because no other country had indicated that it was willing to receive him (Pet. App. A26-A27). Petitioner argued that he could not be deported to the Soviet Union because he had been tried and convicted in absentia in that country in 1962 and had been sentenced to death. The

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[5] Respondent designated the Republic of Estonia as the country of deportation and claimed that he should be deported to the offices maintained by the Republic of Estonia in New York City (see Pet. App. A30-A31).

[6] The Board directed the immigration judge to consider the effect of the United States' nonrecognition of the Soviet annexation of Estonia on the designation of the Soviet Union as the country of deportation (Pet. App. A49-A50).

[7] Relying on an affidavit submitted by the State Department Legal Adviser, the immigration judge also found that deporting petitioner to the Soviet Union would not contravene the United States' policy of nonrecognition of the Soviet Union's forcible incorporation of Estonia (Pet. App. A32).

Board rejected that argument, holding that deporting petitioner to the Soviet Union under these circumstances would not violate due process (*id.* at A28).

5. The court of appeals affirmed (Pet. App. A1-A17). Petitioner argued that his deportation order was invalid, because Sections 241(a)(19), 243(h), and 244(e) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(19), 1253(h), and 1254(e), were an unconstitutional bill of attainder (Pet. App. A8-A9). Those provisions deprive the Attorney General of the authority to grant relief from deportation to persons shown to have participated in Nazi persecution during World War II. Those statutes, petitioner contended, were tantamount to the banishment of all persons within that class from this nation. The court of appeals rejected that argument, for three reasons. First, the denial of discretionary relief was not a "punishment" within the meaning of the Bill of Attainder Clause of the Constitution (Art. I, § 9, Cl. 3), since the deportation of noncitizens is not a punishment (Pet. App. A12). Second, the deportation of persons found to have participated in Nazi persecution furthered the legitimate, nonpunitive interest of protecting the public from such persons (*id.* at A12-A13). Finally, the legislative record showed that Congress enacted the Holtzman Amendment to deny sanctuary to such persons, rather than to punish them (*id.* at A13).

The court also rejected petitioner's argument that his deportation would violate principles of due process and equal protection (Pet. App. A14-A17). The court ruled that petitioner's deportation was not a disguised attempt to extradite him to the Soviet Union, with which this nation has no extradition treaty (*id.* at A15-A16). In addition, the court held that aliens, such as petitioner, have no substantive due process right not to be deported, and that petitioner's procedural due process rights had been "meticulously observed throughout the denaturalization

and deportation proceedings" (*id.* at A16). The court also concluded that, despite petitioner's outstanding capital sentence, deporting him to the Soviet Union would not offend " 'a federal court's sense of decency' " (*id.* at A16-A17, quoting *Gallina* v. *Fraser*, 278 F.2d 77, 79 (2d Cir.), cert. denied, 364 U.S. 851 (1960)), because petitioner had "grossly, callously and monstrously offended" humanity by "order[ing] the extermination of innocent men, women, and children kneeling at the edge of a mass grave" (Pet. App. A17). Lastly, the court held that petitioner's deportation did not violate equal protection principles, because Nazi war criminals were not a class entitled to special judicial protection and because there was a rational basis for requiring the deportation of that class of persons (*ibid.*).

ARGUMENT

1. Petitioner's primary argument is that the Due Process Clause forbids the government from deporting him to a nation in which he was tried and convicted under procedures that do not satisfy our constitutional requirements. It is well settled, however, that a noncitizen has no substantive due process right not to be deported. *Galvan* v. *Press*, 347 U.S. 522, 530-532 (1954); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 590-591 (1952). Moreover, domestic constitutional principles do not apply to the criminal proceedings of a foreign nation. As the court of appeals recognized (Pet. App. A16), even in the context of extradition this Court and the lower courts have consistently refused to grant relief on the ground that American concepts of due process were not or will not be applied in foreign proceedings, or that the conditions awaiting a person to be extradited will not comply with American standards.[8]

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[8] *Neely* v. *Henkel*, 180 U.S. 109, 122 (1901); *In re Burt*, 737 F.2d 1477, 1487-1488 (7th Cir. 1984); *Arnbjornsdottir-Mendler* v. *United*

This Court's decision in *Neely* v. *Henkel*, 180 U.S. 109 (1901), is illuminating on this point. In that case, the Court expressly rejected the claim that a person could not be extradited to a foreign nation because he would not there receive the protections guaranteed by the federal Constitution. Those protections, the Court held, apply only to proceedings conducted in this nation; they "have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country" (*id.* at 122). As the Court explained, "[w]hen an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States" (*id.* at 123).

Relying on dicta in *Gallina* v. *Fraser*, 278 F.2d 77, 79 (2d Cir.), cert. denied, 364 U.S. 851 (1960), petitioner contends (Pet. 31-33) that this Court should create an exception to the principle stated in *Neely* and should forbid his

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States, 721 F.2d 679, 683 (9th Cir. 1983); *Sindona* v. *Grant*, 619 F.2d 167, 174-175 (2d Cir. 1980); *Peroff* v. *Hylton*, 542 F.2d 1247, 1249 (4th Cir. 1976), cert. denied, 429 U.S. 1062 (1977); *United States ex rel. Bloomfield* v. *Gengler*, 507 F.2d 925, 928 (2d Cir. 1974); *Holmes* v. *Laird*, 459 F.2d 1211, 1217-1219 (D.C. Cir.), cert. denied, 409 U.S. 869 (1972); *Garcia-Guillern* v. *United States*, 450 F.2d 1189, 1192 (5th Cir. 1971), cert. denied, 405 U.S. 989 (1972); *Gallina* v. *Fraser*, 278 F.2d 77, 78 (2d Cir.), cert. denied, 364 U.S. 851 (1960); *In re Ryan*, 360 F. Supp. 270, 274 (E.D.N.Y. 1973); see *Jhirad* v. *Ferrandina*, 536 F.2d 478, 484-485 (2d Cir.), cert. denied, 429 U.S. 833 (1976); see also *Brice* v. *Pickett*, 515 F.2d 153, 154 (9th Cir. 1975) (rejecting argument that an alien may not be deported on the basis of a "foreign conviction * * * obtained in proceedings which if conducted in this country would be violative of United States constitutional guarantees," because there is "no requirement that a foreign court's proceedings or conviction must conform to United States constitutional standards").

deportation to the Soviet Union, because his deportation there would be "antipathetic to a federal court's sense of decency." In *Gallina* v. *Fraser,* the court of appeals permitted the extradition of a person to a foreign nation where he had been convicted in absentia, but the court suggested that there might be circumstances in which a federal court could refuse to give effect to an extradition order. Since *Gallina* was decided, several courts have suggested that there may be such an exception. As petitioner concedes (Pet. 32), however, no court has ever denied deportation or extradition on that ground. See *Arnbjornsdottir-Mendler* v. *United States*, 721 F.2d 679, 683 (9th Cir. 1983); *Sindona* v. *Grant*, 619 F.2d 167, 174-175 (2d Cir. 1980) ("the degree of risk to Sindona's life from extradition is an issue that properly falls within the exclusive purview of the executive branch"); *Peroff* v. *Hylton*, 542 F.2d 1247, 1249 (4th Cir. 1976), cert. denied, 429 U.S. 1062 (1977) ("[i]f there are potential assassins in Swedish prisons, it is for Sweden to take measures adequate to assure Peroff's safety"). As the court of appeals explained in this case (Pet. App. A9), petitioner's claim is essentially a plea for clemency, which the court rejected because of the gravity of petitioner's crimes. The fact that the court below—the same court that decided *Gallina* v. *Fraser*—determined that this case was not an appropriate one in which to apply the exception (for extradition cases) referred to in *Gallina* disposes of petitioner's suggestion that this case is in conflict with the decisions of other lower courts.

Petitioner also argues (Pet. 30-40) that the United States is equally responsible with the Soviet Union for any punishment he may receive, because, he asserts, the United States has engineered the denaturalization and deportation proceedings to enable the Soviet Union to implement its 1962 judgment and sentence. That assertion is in error. The Board of Immigration Appeals designated the Soviet Union as the country of deportation only after

applying the criteria set forth in 8 U.S.C. 1253 and only after concluding that no other country was willing to accept petitioner (Pet. App. A26).[9] In fact, petitioner was given the opportunity to designate a country to receive him, which, as the court of appeals explained (*id.* at A15), "strongly undercuts his contention that his deportation was a disguised attempt to extradite him to the Soviet Union." Accordingly, there is no merit to petitioner's claim that the United States engineered these proceedings to ensure that he would be sent to the Soviet Union.[10]

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[9] Petitioner claims (Pet. 44-45) that the evidence does not support this finding. The declaration of the State Department Legal Adviser, which was considered by the immigration judge, however, states that "the U.S.S.R. is willing to accept Mr. Linnas" and that "at the current time, no other country has agreed to accept Mr. Linnas" (Pet. App. A110). Petitioner has not identified any contrary evidence. Petitioner also asserts (Pet. 45-46) that deporting him to the Soviet Union is inconsistent with the United States' policy of nonrecognition of the Soviet Union's annexation of Estonia. The declaration of the State Department Legal Adviser is to the contrary, however (Pet. App. A110-A111).

[10] None of the cases cited by petitioner (Pet. 34-35) supports his claim. Neither *Reid* v. *Covert*, 354 U.S. 1 (1957) (a civilian may not be court-martialed for a capital crime), nor *Rosado* v. *Civiletti*, 621 F.2d 1179 (2d Cir.), cert. denied, 449 U.S. 856 (1980) (a prisoner held in federal custody can challenge the validity of his conviction in a foreign court), is remotely relevant to this case. *Plaster* v. *United States*, 720 F.2d 340 (4th Cir. 1983), and *In re Burt*, *supra*, are also factually distinguishable. In *Plaster*, the defendant was given transactional immunity by the federal government from any prosecution for murder by the United States or by West Germany in exchange for his testimony. He later challenged the government's decision to extradite him to West Germany, where he was charged with murder. The court of appeals ruled that he could challenge his extradition, because the government's decision to extradite him violated the terms of its prior agreement. 720 F.2d at 344-349. There is no similar agreement in this case. *In re Burt* stated that a person could challenge the government's decision to extradite him where the government had acted unlawfully (737 F.2d at 1484). In this case, however, the government has not acted unlawfully at any point in the proceedings against petitioner.

Finally, petitioner challenges (Pet. 37-39) the sufficiency of the evidence to support his participation in the atrocities at the Tartu concentration camp. He contends that much of the evidence should have been ruled inadmissible because it was unreliable. The admissibility of that evidence, however, was fully litigated during petitioner's denaturalization proceeding (see Pet. App. A59-A60), and the issue was resolved against petitioner at that time.[11] Moreover, the district court in this case found that petitioner had failed to show that the government's evidence was incredible or inauthentic in any respect (*id.* at A74). The court also stated that the primary evidence on which it relied were the documents containing petitioner's signature as "Chief" of the concentration camp (*id.* at A75 n.16) and noted that those documents were subject to examination in this country. At trial, petitioner failed to produce any expert to challenge the authenticity of either the documents themselves or his signature on them (*ibid.*).

2. Petitioner also contends (Pet. 42-43) that the Holtzman Amendment to the Immigration and Nationality Act, 8 U.S.C. 1251(a)(19), is an unconstitutional bill of attainder. The court of appeals correctly rejected that claim, as have each of the other courts of appeals that have considered the issue. *Schellong* v. *INS,* No. 85-2430 (7th Cir. Oct. 15, 1986), slip op. 14-15; *Artukovic* v. *INS*, 693 F.2d 894, 897 (9th Cir. 1982).

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[11] Petitioner's reliance (Pet. 38) on the district court's decision in *United States* v. *Kungys,* 571 F. Supp. 1104 (D.N.J. 1983), rev'd on other grounds, 793 F. 2d 516 (3d Cir. 1986), petition for cert. pending, No. 86-228, is also misplaced. The court of appeals in *Kungys* ruled that depositions taken in the Soviet Union are not per se inadmissible and that the admissibility of such depositions must be decided on a case-by-case basis (793 F.2d at 520 n.2). Here, the district court found that the depositions were reliable and were corroborated by other evidence (Pet. App. A74-A75). In fact, the district court in *Kungys* relied on those grounds to distinguish the decision in this case to admit the depositions taken in the Soviet Union (571 F. Supp. at 1133).

For a particular legislative act to constitute a prohibited bill of attainder, it must determine the guilt of a specific, identifiable person or category of individuals without the protections of a judicial trial, and it must then inflict punishment on that person or persons. *Selective Service System* v. *Minnesota Public Interest Research Group*, 468 U.S. 841, 846-847 (1984); *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 468 (1977); *United States* v. *Lovett*, 328 U.S. 303, 315 (1946). Neither the intensity nor the scope of the hardship imposed by a legislative enactment is determinative of its character as a punishment; sanctions that serve nonpunitive purposes fall outside the reach of the Bill of Attainder Clause, even if the sanctions are harsh in their effect. *Selective Service*, 468 U.S. at 853; *Flemming* v. *Nestor*, 363 U.S. 603, 616 & n.9 (1960); *United States* v. *Lovett*, 328 U.S. at 324 (Frankfurter, J., concurring).

The Holtzman Amendment does not impose punishment, for three reasons. First, the Amendment does not impose a sanction that falls within the meaning of the term "legislative punishment" (*Selective Service*, 468 U.S. at 852; *Nixon*, 433 U.S. at 473). As the court of appeals explained (Pet. App. A8-A14), the deportation of noncitizens historically has been recognized to be an inherent sovereign prerogative necessary for the safety of the nation, not a punishment inflicted upon a person deemed ineligible to remain within this country. *E.g.*, *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038-1039 (1984); *Flemming* v. *Nestor*, 363 U.S. at 616; *Galvan* v. *Press*, 347 U.S. at 530-531; *Harisiades* v. *Shaughnessy*, 342 U.S. at 594; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 730 (1893). Second, the Amendment furthers a legitimate, nonpunitive legislative purpose: denying sanctuary to Nazi war criminals. As the Seventh Circuit recently explained, "[t]he purpose of [the Holtzman Amendment] is not to

punish individuals for actions previously taken, but to ensure that the United States is not a haven for individuals who assisted the Nazis in the brutal persecution and murder of millions of people." *Schellong* v. *INS*, slip op. 15. Finally, as the court of appeals found (Pet. App. A13), the legislative history of the Amendment does not manifest " 'the unmistakable evidence of punitive intent' " necessary to turn a facially nonpunitive statute into a forbidden punishment (*Selective Service*, 468 U.S. at 855-856 n.15 (quoting *Fleming*, 363 U.S. at 619)). See *Schellong* v. *INS*, slip op. 14-15. Petitioner has pointed to nothing in the legislative record that is to the contrary.

In part, petitioner's argument seems to be that the Holtzman Amendment is a bill of attainder as to him because it requires his deportation and because he was sentenced to death in the only country that is willing to receive him. Under petitioner's theory, the question whether a statute imposes a punishment would not turn on the nature of the hardship it generally imposes or on the intent of Congress in adopting the measure. Instead, that question would turn on the sanctions imposed by a foreign government, over which Congress has no authority, and the validity of the procedures by which those sanctions are imposed. Petitioner is therefore invoking the Bill of Attainder Clause to seek the same kind of inquiry into the validity of a foreign nation's criminal procedures that the courts have declined to undertake under the Due Process Clause. Petitioner's claim that the Holtzman Amendment is a bill of attainder is thus a restatement of his claim that his deportation to the Soviet Union violates due process. His argument fails as a bill of attainder claim for the same reasons that it fails under the Due Process Clause.[12]

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[12] Petitioner refers to the Eighth Amendment Cruel and Unusual Punishments Clause and to equal protection principles in his questions presented (Pet. i), but he does not develop those arguments in his peti-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1986

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tion. In any event, they lack merit. Petitioner's reliance on the Eighth Amendment is misplaced, because deportation is not a punishment. *Fong Yue Ting* v. *United States*, 149 U.S. at 730. Petitioner's equal protection argument was properly rejected by the court of appeals (Pet. App. A17).

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